
CANADA / JUDGMENT

Stewart v. Clark

2013 BCCA 359

COURT

British Columbia Court of Appeal

DECIDED

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2013 BCCA 359 Stewart v. Clark

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Stewart v. Clark,

2013 BCCA 359

Date: 20130806

Docket: CA40137

Between:

Donald Stewart

Appellant

(Plaintiff)

And

Alan Clark, The Financial Institutions Commission for British Columbia,

The Attorney General of British Columbia,

Her Majesty the Queen in Right of the Province of British Columbia,

and Morneau Shepell Inc.

Respondents

(Defendants)

Before:

The Honourable Madam Justice Levine

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice Garson

On Appeal from an Order of the Supreme Court of British Columbia,

Dated July 20, 2012 (Stewart v. Clark, 2012 BCSC 1093,

Vancouver Registry, Docket Number S118194)

Counsel for the Appellant:

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Counsel for the Respondents

Alan Clark, The Financial Institutions Commission for British Columbia, The Attorney General of British Columbia, and Her Majesty the Queen in Right of the Province of British Columbia:

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Morneau Shepell Inc.

R.D.W. Dalziel

L. Swartz

Place and Date of Hearing:

Vancouver, British Columbia

April 9 & 10, 2013

Place and Date of Judgment:

Vancouver, British Columbia

August 6, 2013

Written Reasons by:

The Honourable Madam Justice Levine

Concurred in by:

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice Garson

Summary:

Appeal from the decision of a Supreme Court justice who dismissed the appellant's action against the respondents. The appellant alleged the Superintendent of Pensions of British Columbia acted unlawfully in failing to direct that pension funds be distributed in accordance with priority provisions in the pension plan, causing him, and other retired members, loss of pension income. The chambers judge dismissed the action as an abuse of process on two grounds: that the appellant made inconsistent claims in this and earlier proceedings, and that his action amounted to a collateral attack on a statutory decision that could only be challenged by an application for judicial review.

On appeal, the appellant argued the chambers judge took too strict an approach to the doctrine of abuse of process in dismissing his action, misapprehending the evidence and the law.

Held: appeal dismissed. The appellant did not make inconsistent claims, but was dealing with the apparent inconsistency between the two positions of the Superintendent. However, the appellant's action amounted to a collateral attack on the Superintendent's decision. His claims raise no issues that are distinct and separate from those that are properly the subject of judicial review, and the chambers judge properly dismissed them as an abuse of process.

Reasons for Judgment of the Honourable Madam Justice Levine:

- [1] The appellant, Donald Stewart, appeals from the decision of a Supreme Court justice who ordered that his action against the respondents be dismissed as an abuse of process on two grounds: that he made inconsistent claims in this and another proceeding, and that his action amounted to a collateral attack on a statutory decision that could only be challenged by an application for judicial review.
- [2] The appellant's claim arises from the reduction of his retirement pension following the bankruptcy of his former employer. He alleges that the Superintendent of Pensions of British Columbia acted unlawfully in failing to direct that pension funds be distributed in accordance with priority provisions in the pension plan, causing him, and other retired members, loss of pension income. The Superintendent took the position that the priority provisions were not properly registered, and were invalid. The appellant made a claim against the directors and officers of his employer, alleging they failed to properly register the priority provisions. After that claim was settled, he commenced this action claiming that the priority provisions had been properly registered, and the Superintendent, the Financial Institutions Commission for British Columbia acting under his direction, and the administrator of the pension plan, the respondent Morneau Shepell Inc., unlawfully failed to apply them.

- [3] The appellant argues on appeal that the chambers judge took too strict an approach to the doctrine of abuse of process in dismissing his action, misapprehending both the evidence and the law.
- [4] As will be seen from my reasons that follow, I am of the view that the appellant did not make inconsistent claims, but that his action was a collateral attack on the Superintendent's decision. In the result, I would dismiss the appeal.

Background

The Parties

- [5] The appellant was employed at a pulp mill in Nanaimo from 1968 to 2004. When he retired on April 1, 2004, he was a member of the Pope & Talbot Pension Plan for Permanent Salaried Employees, and was entitled to a "defined benefit" pension.
- [6] His former employer, Pope & Talbot Ltd., became insolvent in October 2007 and sought protection from creditors under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36. It went into receivership, and ultimately bankruptcy. In the course of those proceedings, the Plan terminated on May 10, 2008. At the time the Plan terminated, it had insufficient assets to meet its obligations to all of its members.
- [7] The appellant claims that his pension benefits have been reduced by 32.2% through the actions of the respondents. He brings his claim on his own behalf and on behalf of all other members of the Plan who had retired or reached their normal retirement age by October 29, 2007 (the "Retired Members").
- [8] Alan Clark was, during the material times, the Superintendent of Pensions for the Province of British Columbia, responsible for the administration and enforcement of the Pension Benefits Standards Act, R.S.B.C. 1996, c. 352.
- [9] Morneau Shepell Inc. (then operating under the name Morneau Sobeco) was appointed by the Superintendent in July 2008 to administer the wind-up of the Plan.
- [10] The Superintendent and the other respondents, with the exception of Morneau, are referred to in this appeal as the "Crown respondents". The appellant alleges the Financial Institutions Commission for British Columbia ("FICOM") is the regulatory body that administers and enforces the PBSA, which is denied by the Crown respondents. They say that neither FICOM nor the Attorney General for British Columbia had any relevant role to play in the matters alleged in these proceedings, and the proper party is Her Majesty the Queen in Right of the Province of British Columbia.
- [11] The question of which of the Crown respondents is the proper party is not an issue on this appeal. For the purposes of these reasons for judgment, a reference to the Superintendent will include FICOM.

The Pope & Talbot Pension Plan for Permanent Salaried Employees

- [12] The Plan is the product of the merger of two pension plans, which was effective January 1, 2001. The (merged) Plan was submitted to the Superintendent for registration and was registered in 2002 or 2003.
- [13] The Plan was amended effective January 1, 2004 to add provisions for defined contribution benefits. The amendments were submitted to the Superintendent for registration in February 2006, and on August 23, 2006, the Superintendent advised Pope & Talbot Ltd. by letter and by "Notice of Registration of Amendment" that the amendment was "acceptable and approved" and "accepted for registration under the Pension Benefits Standards Act".
- [14] Section 45 of the PBSA requires that a pension plan containing a defined benefit provision must include provisions for the allocation and distribution of assets on termination of the plan when the assets of the plan are not sufficient to pay all benefits on the winding-up. Those provisions must be "on the prescribed basis or on another basis that the superintendent considers reasonable and equitable in the circumstances and consents to, in writing".
- [15] When registered in 2002 or 2003, the Plan included allocation and distribution provisions on termination of the Plan in Articles 19.05 and 19.09. The Plan registered in 2006 included similar provisions in Sections 10.05 and 10.09.
- [16] In his notice of civil claim in this action, the appellant stated that "The Plan afforded priority to retired members with respect to the allocation and distribution of Plan assets in the event the Plan was terminated in an underfunded state (the 'Priority Termination Provisions')". That is, the Retired Members would receive the defined benefits provided for in the Plan before benefits were paid to other pension claimants. The appellant summarized the "Priority Termination Provisions [in] Section 10 of the amended Plan" as follows:
1. First, to provide to DC [defined contribution] members all the benefits accumulated in the DC Members' Accounts;
 2. Next, to provide benefits equal to the contributions made by DB [defined benefit] Members;
 3. Next, to provide the accrued benefits for each DB Member who had reached his Normal Retirement Date;
 4. Next, to provide for accrued benefits established 2 or more years before the date of termination; and
 5. Finally, to provide for all remaining accrued benefits in order of the date on which they were established starting with the earliest date.

- [17] In their responses to the civil claim, the respondents do not accept this description of the allocation and distribution provisions of the Plan. They say that this section does not address the method of allocation in the event the Plan was underfunded at the time of wind-up and that Section 10.09 provided the method of allocation if the funds in the Plan were insufficient to meet all liabilities upon termination. Section 10.09 provides:

In the event that the Plan is terminated and the assets in the Pension Fund at that time are insufficient to meet all Plan obligations, such obligations shall be payable to the extent and in the priority as determined by the Company subject to the provisions of the Act.

- [18] The Crown respondents note in their factum that the effect of Section 10.09 is not an issue that arises for resolution on this appeal.

Superintendent's Review of the Priority Termination Provisions

- [19] The issues in this appeal turn to some extent on the timing and extent of the receipt by the appellant and other Retired Members of information and documents relating to the Superintendent's review and position with respect to the Priority Termination Provisions. This summary of the chronology of the Superintendent's review and the positions he took derives from the record filed on this appeal, including the pleadings, affidavits and documents.
- [20] Following the insolvency of Pope & Talbot Ltd., the Superintendent commenced a review of the provisions in the Plan concerning allocation and distribution on termination. At that time, Pope & Talbot Ltd. was the administrator of the Plan, assisted by Mercer Human Resource Consulting.
- [21] The Superintendent wrote to Mercer in February 2008 expressing concern about whether the provisions complied with the PBSA and the Pension Benefits Standards Regulation, B.C. Reg. 433/93. Counsel for Pope & Talbot Ltd. replied that it was not clear the provisions were non-compliant, but in any event, it would not amend the Plan without a court order in the CCAA proceedings. No court order was sought.
- [22] On March 18, 2008, the Superintendent wrote to Pope & Talbot Ltd. advising that the priority provisions included in Section 10 of "the current Plan text" did not comply with the PBSA and Regulation. He stated that no request for approval of changes from the predecessor pension plan (restated as of January 1, 1993 and registered in 1995) (the "1993 Plan") were made and none had been granted. Therefore, he said, the provisions of the 1993 Plan were still in force and would be applied on winding-up of the Plan.
- [23] The provisions of the 1993 Plan tracked the language of s. 39(2)(b) of the Regulation. It is common ground that this regulation provides for a pro rata distribution of plan assets where the plan has insufficient assets to pay all benefits on winding-up, and is the "prescribed basis" for the purpose of s. 45(1) of the PBSA.

- [24] In August 2008, the Superintendent posted a notice on the FICOM website stating that the Priority Termination Provisions had not been approved and the pro rata distribution method would be used on the winding-up of the Plan.
- [25] Morneau wrote to the appellant in November 2008, February 2009, and March 2010 providing information concerning the winding-up of the Plan, noting that the Plan was underfunded and pension benefits would be reduced.
- [26] On February 19, 2009, the Superintendent sent a letter to Pope & Talbot Ltd. noting that the Plan had termination provisions that varied from those prescribed by s. 39 of the Regulation. He stated: "While your plan may have received written consent to use the priority method of distribution and you may continue to use this method, I wish to advise you that, in future, staff will not recommend that the Superintendent consent to this method given the disparity involved".
- [27] On June 9, 2009, the Superintendent directed Morneau to use the pro rata distribution method provided in the 1993 Plan. On July 23, 2009, the Superintendent again wrote to Morneau confirming that the pro rata distribution method applied to all members of the Plan.
- [28] The appellant retained counsel on or about August 17, 2009. The records contain correspondence from September 11, 2009 to April 1, 2010 between counsel and the Superintendent and his representatives concerning the Superintendent's position with respect to the Priority Termination Provisions. Counsel made several requests for information and received disclosure of documents under the Freedom of Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, during that time.

CCAA Proceedings

- [29] In May 2009, PricewaterhouseCoopers Inc., the monitor in the Pope & Talbot Ltd. CCAA proceedings, informed the Retired Members and others that the monitor intended to seek an order disallowing all pension-related claims against directors and officers. The appellant and another Retired Member attended the CCAA hearing on July 23, 2009, which was adjourned with respect to the pension claims to August 27, 2009. The appellant retained counsel on or about August 17, 2009.
- [30] At the hearing on August 27, 2009, Mr. Justice Walker adjourned the consideration of the pension claims to October 20, 2009 and ordered the claimants to file a statement of claim "or like document" with the monitor by September 9, 2009.
- [31] In their statement of claim (delivered to the monitor but not filed in the Supreme Court Registry), the Retired Members claimed against the directors and officers of Pope & Talbot Ltd. on two grounds. The first claim was that the directors and officers had misrepresented to members of the Plan that they would contribute to the Plan sufficient monies received from the settlement of the softwood lumber dispute between Canada and the United States

to fully fund the Plan, and instead used some of those monies to pay bonuses to executives. A similar claim was made by members of the Plan who had not yet retired, called the "Under-55s". The second claim was that the directors and officers were negligent in failing to ensure that the Plan was properly registered under the PBSA and Regulation so that the Priority Termination Provisions were valid and effective.

- [32] In its reply to the Retired Members' statement of claim, the monitor asserted that the Plan was validly registered in 2006 and was effective in accordance with its terms. The monitor also denied that any representation had been made with respect to using the softwood lumber rebate to fund the Plan. Both the Retired Members and the Under-55s settled their claims for \$100,000 on October 15, 2009.

Civil Claim

- [33] The appellant commenced this action by filing a notice of civil claim on December 2, 2011. The claims against the Crown respondents are for damages for misfeasance in public office, negligence, and conspiracy with Morneau, and against Morneau for negligence, breach of fiduciary duties, and breach of trust, arising out of the facts alleged (at paras. 10-12 of the notice of civil claim):
10. The Plan afforded priority to retired members with respect to the allocation and distribution of Plan assets in the event the Plan was terminated in an underfunded state (the "Priority Termination Provisions").
 11. In or about 2008, without any legal authority for doing so, Superintendent Clark ordered representatives of Morneau to distribute Plan assets on a pro rata basis as opposed to the priority basis provided for in the Plan, and contrary to the Priority Termination Provisions. Although the Plan was in an underfunded state at that time, the Plan assets were sufficient to pay all of the benefits the Retired Members, including the Plaintiff, were entitled to, had the Plan been administered according to its text.
 12. Morneau breached its duties as Plan administrator, including a duty of trust to the Plaintiff, by distributing Plan assets on a pro rata basis contrary to the Plan text and knowing that the directions received from Superintendent Clark were contrary to the terms of the Plan and that the Superintendent Clark did not have lawful authority to give that direction.
- [34] In their factum, the Crown respondents summarize the substance of the appellant's claim (at para. 22):

The Superintendent registered the restated document for the Revised Pope Plan in 2002, and the further restatement in 2006. The Appellant's claim that the Superintendent approved a distribution method other than the pro rata methods prescribed in the Regulation rests in large part on correspondence from 2002 and 2006 indicating the Superintendent's registration of the restated document for the Revised Pope Plan. The Crown Respondents dispute that a priority distribution method was ever approved under section 45(1) of the PBSA.

Applications to Dismiss the Appellant's Claim as an Abuse of Process

- [35] In April 2012, the respondents brought separate applications for an order striking the appellant's action as an abuse of process.
- [36] Morneau's position was that the position taken by the Retired Members in the CCAA proceedings, that the directors and officers had negligently failed to properly register the Plan so that the Priority Termination Provisions were effective, is inconsistent with the position taken by the appellant in the action, that the Superintendent had unlawfully failed to apply the Priority Termination Provisions in administering the Plan. Morneau argued that the appellant's position in the CCAA proceedings amounted to an election as between inconsistent positions, and to allow his claim against the Superintendent to proceed would be an abuse of the court's process.
- [37] The Crown respondents' position was that the Retired Members' remedy for the Superintendent's alleged unlawful act was to seek judicial review of his decision on a timely basis. They argued that the tort action was an impermissible collateral attack on the Superintendent's decision which amounted to an abuse of process.
- [38] The chambers judge accepted the respondents' arguments. In his reasons for judgment, he found the appellant's action to be an abuse of process on both grounds: that the appellant had made an election in the CCAA proceedings that was inconsistent with his claim in the civil action, and that he had failed to seek a remedy through judicial review of the Superintendent's decision. In the result, he dismissed the appellant's action as an abuse of process.

Discussion

- [39] There is not much dispute about the general legal principles applicable in this appeal. The law is well-established that it may be an abuse of process to plead inconsistent claims (see e.g., *First Majestic Silver Corp. v. Davila Santos*, 2012 BCCA 5 and *Pepper's Produce Ltd. v. Medallion Realty Ltd.*, 2012 BCCA 247), and to collaterally attack a statutory decision by commencing a civil action instead of seeking judicial review (see e.g., *Cimaco International Sales Inc. v. British Columbia (Attorney General)*, 2010 BCCA 342 and *Boucher v. Stelco Inc.*, 2005 SCC 64). The chambers judge applied those principles in coming to his decision. The issue on appeal is whether he did so properly.
- [40] The appellant says that the doctrine of abuse of process is ultimately about the integrity of the administration of justice, and is not applied as a strict question of law. In dismissing an action as an abuse of process, the court is to consider all of the particular circumstances of the particular case and exercise its discretion to determine if allowing the action to continue will enhance or detract from the effectiveness of the adjudicative process as a whole. The appellant claims the chambers judge failed to properly consider and apply these principles in the context of this case.

Election between Inconsistent Claims

- [41] The appellant argues that the position taken against the directors and officers of Pope & Talbot Ltd. in the CCAA proceedings is not irreconcilably inconsistent with the position taken against the respondents in the civil claim. He says that each of the persons against whom claims were made could be liable to the Retired Members for different reasons, and in making and settling the claim in the CCAA proceedings, the Retired Members did not make an irrevocable choice, but pursued the only remedy then available to them. He points out that neither the Superintendent nor Morneau was a party to the CCAA proceedings, he had a limited time frame and forum in which to make any claim in those proceedings, the information he then had about the Superintendent's position with respect to the validity of the Priority Termination Provisions was incomplete, confusing and inconsistent, and the primary claim in any event was with respect to the failure of the directors and officers to contribute softwood lumber rebate monies to the Plan. As for the settlement of that claim, he points out that there was no adjudication of the claim, the Under-55s received the same amount though their claim was only in respect of the softwood lumber rebate monies, the amount was nominal in relation to their losses, and as reported by the monitor to the court in the CCAA proceedings, represented little if anything more than legal costs and expenses incurred in pursuing the pension claims.
- [42] The appellant's position is that the claim in the CCAA proceedings was fundamentally an alternative claim, not an inconsistent claim, to those made against the respondents in the civil action, and that there is no abuse of the court's process in allowing the claim to proceed. In support of his characterization of the two claims, he cites *United Australia v. Barclay's Bank*, [1941] A.C. 1 (H.L.), and *National Bank Financial Ltd. v. Potter*, 2005 NSSC 8, *aff'd* (sub nom. *Mahoney v. National Bank Financial Ltd.*) 2005 NSCA 139.
- [43] Morneau's position is that the claims in the two proceedings are fundamentally inconsistent: that the appellant claimed in the CCAA proceedings that the Plan was not validly registered, and in the civil action, he claims that it is. It argues that no distinction can be drawn between inconsistent allegations and abuse of process – they are "two sides of the same coin" – an election between inconsistent claims made in the pleadings in prior litigation renders the subsequent inconsistent pleading an abuse of the court's process. It goes on to argue that in making his claim against the directors and officers for failing to register the Plan, the appellant was legally fixed with the knowledge that he could thereafter make no claim against the Superintendent and Morneau for failing to administer the Plan in accordance with its terms.
- [44] What is missing from the chambers judge's reasons for judgment and Morneau's argument on the appeal is a full consideration of the evidence of the Superintendent's position at the relevant times. In my opinion, that examination reveals that the appellant's claim against the directors and officers of Pope & Talbot Ltd. was not fundamentally inconsistent with the claim against the respondents.

- [45] The crux of the appellant's claim concerns the inconsistency between the Superintendent's notification in 2006 that the amendment to the Plan (which included the Priority Termination Provisions) was "acceptable and approved", and his position starting in 2008 that the Priority Termination Provisions had not been approved and were not valid.
- [46] The appellant's claim against the directors and officers reflected this inconsistency. The statement of claim states (at para. 39): "On or about August 23, 2006, FICOM purported to register the Amendment". It goes on to state (at paras. 42-43):
- [42] On or about March 18, 2008, the Superintendent advised Beth Hardman that the priority for allocation and distribution of assets set out in section 10 of the Amended Plan were not valid and could not be relied on.
- [43] Further, in or about July 2008, FICOM appointed Morneau Sobeco as administrator of the plan and advised Morneau Sobeco that the Amended Plan was of no force and effect because the Plan had not been properly registered and the approval of the Superintendent had not been obtained at the time of registration.
- [47] Thus, the claim against the directors and officers reflected the Superintendent's position that the Plan had not been properly registered and approved, though the Superintendent had earlier "purported" to register the amendment. The appellant was dealing with the apparent inconsistency between the two positions of the Superintendent. It is not clear to me how making a claim against the directors and officers that is consistent with one of the Superintendent's positions is fundamentally inconsistent with a claim against the Superintendent that is consistent with the other of his positions.
- [48] In later exchanges between counsel for the appellant and the Superintendent, the Superintendent explained that although the Plan containing the Priority Termination Provisions was registered in 2002 and again in 2006, the proper procedure had not been followed in submitting the Priority Termination Provisions for specific approval, and the registration and "acceptance and approval" of the amended Plan in 2002 and 2006 did not satisfy the requirements of s. 45(1) of the PBSA for approval of the Priority Termination Provisions. It seems to me that the Superintendent's explanation for the apparent inconsistency between his 2006 and 2008 positions demonstrates why the appellant's claim against the directors and officers is not fundamentally inconsistent with his claim against the respondents: the two positions, as explained by the Superintendent, are not inconsistent: though the Plan was registered and "accepted and approved", the Priority Termination Provisions specifically were not.

- [49] The respondents were not parties to the CCAA proceedings, and it is unrealistic for Morneau to suggest that the appellant could have applied to the judge to open that process to add claims against them. The Retired Members were under strict time limits and had incomplete and inconsistent information from the Superintendent and the monitor regarding the registration of the Plan. As seen from the quantum of the settlement they received, their claims were given nominal acknowledgment in the CCAA proceedings.
- [50] My conclusion that the claim against the directors and officers is not fundamentally inconsistent with the claim against the respondent is sufficient to dispose of this ground of appeal, to which I would accede. I would not dismiss the appellant's action on this basis.
- [51] I would comment further, however, that I am of the view that Morneau's equivalence of inconsistent pleadings with abuse of process conflates these two legal principles. There is a complex body of law on what constitutes impermissible inconsistent pleadings, and on the concept of abuse of process. As discussed in *First Majestic Silver Corp.* in the context of allegations of inconsistent pleadings, the concept of abuse of process concerns the court's inherent jurisdiction to protect the court's process by preventing the bringing of proceedings that are "unfair to the point that they are contrary to the interest of justice" and "oppressive treatment" (at para. 22, quoting *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 35), and there is authority that inconsistent pleadings may amount to an abuse of process (at para. 25, quoting *Mystar Holdings Ltd. v. 247037 Alberta Ltd.*, 2009 ABQB 480 at para. 49). Whether inconsistent pleadings amount to an abuse of process requires consideration in the context and circumstances of the particular case.

Collateral Attack

- [52] The appellant argues that the doctrine of collateral attack was wrongly applied in this case, because his civil action is not an attempt to challenge the validity of or to set aside the Superintendent's decision, but is a claim for damages resulting from tortious actions of the Superintendent in the course of administering the Plan. The appellant relies on *Canada (Attorney General) v. TeleZone Inc.*, 2010 SCC 62, and its companion cases, in which the Supreme Court of Canada held that the doctrine of collateral attack will not always require a litigant to seek judicial review of a statutory decision before commencing a civil claim for damages on the ground that the decision is unlawful.
- [53] The Crown respondents (and the chambers judge) say that *TeleZone* was a decision about the jurisdiction of the Federal Court of Canada and provincial superior courts and did not change the applicability of the doctrine of collateral attack. They say that where a litigant must prove, in his claim for damages, that a statutory decision is unlawful, the claim amounts to a collateral attack on the decision and cannot be brought other than by proceedings for judicial review. An improper attempt to avoid judicial review is an abuse of process.

- [54] All of the parties agree that the question for resolution is whether the appellant's claims for damages amount to an impermissible collateral attack on the Superintendent's decision that the distribution of assets from the Plan would be on a pro rata basis, the only proper remedy for which was a timely application for judicial review.
- [55] It is my opinion that TeleZone decided more than the jurisdictional issue from which it arose. In that case, TeleZone sued in the Ontario Superior Court of Justice for damages arising from a decision of the Minister of Industry Canada rejecting its application for a licence to provide telecommunication services. The Attorney General challenged the jurisdiction of the Ontario Superior Court to proceed with the claim for compensation without an order from the Federal Court quashing the Minister's decision, on the basis that the claim was an impermissible collateral attack on that decision. The Attorney General relied on *Canada v. Grenier*, 2005 FCA 348, which held that the Federal Court had exclusive jurisdiction in relation to decisions of all federal boards, commissions, and tribunals.
- [56] The Supreme Court of Canada held that the Federal Court does not have exclusive jurisdiction over all claims against federal decision-makers, expressly overruling *Grenier*. In the course of his reasons for judgment for the unanimous Court, Justice Binnie noted (at para. 18):

This appeal is fundamentally about access to justice. People who claim to be injured by government action should have whatever redress the legal system permits through procedures that minimize unnecessary cost and complexity. The Court's approach should be practical and pragmatic with that objective in mind.

- [57] Justice Binnie went on to distinguish judicial review from private law claims for compensation for unlawful government action. He pointed out (at para. 25):

Not all invalid government decisions result in financial losses to private persons or entities. Not all financial losses that do occur will lay the basis for a private cause of action. For practical purposes, the real concern here is with executive decisions by Ministers and civil servants causing losses that may or may not be excused by statutory authority.

And (at para. 30):

while Crown liability in tort and the validity of an underlying administrative decision may generate some overlapping considerations, they present distinct and separate justiciable issues.

- [58] The Court rejected the Attorney General's argument that TeleZone's action was a collateral attack on the Minister's decision for three reasons (at paras. 63-66). The first and third reasons responded to the jurisdictional issue. The second, relied on by the appellant in this case, was that TeleZone was not seeking to set aside the order: "On the contrary, the ministerial order and the financial losses allegedly consequent on that order constitute the foundation of the damages claim" (at para. 64).

[59] The Court addressed the Attorney General's concern that its ruling would open the door to "artful pleaders" who would dress up their judicial review applications as damages claims, saying (at para. 75): "no amount of artful pleading in a damages case will succeed in setting aside the order said to have harmed the claimant or enjoin its enforcement" and (at para. 78):

There is always a residual discretion in the inherent jurisdiction of the provincial superior court to stay the damages claim because in its essential character, it is a claim for judicial review with only a thin pretence to a private wrong.

[60] The Court further stated (at para. 76):

Where a plaintiff's pleading alleges the elements of a private cause of action, I think the provincial superior court should not in general decline jurisdiction on the basis that the claim looks like a case that should be pursued on judicial review. If the plaintiff has a valid cause of action for damages, he or she is normally entitled to pursue it.

[61] I take it from these comments that it is an overstatement of the doctrine of collateral attack to hold that a civil claim that requires, as one of its elements, a finding that a statutory decision-maker acted unlawfully, amounts to an abuse of process of the court because the claimant could have sought judicial review of the decision. Nor is it a matter of the claimant being required to pursue the most timely or efficient proceeding, though these factors will enter into a consideration of whether the nature of the proceeding chosen amounts to an abuse of process.

[62] A court surely has the power and responsibility to ensure that its processes are not abused by "artful pleaders" and those who would avoid legally mandated remedies for their complaints. On the other hand, the court also has the obligation and discretion not to restrict access to justice by too strictly applying exclusionary concepts.

[63] In this case, the appellant does not seek to set aside the Superintendent's decision – it is clearly too late for that. He seeks to be compensated for the reduction in his pension resulting from the Superintendent's refusal to apply the Priority Termination Provisions. He alleges the Superintendent acted unlawfully in so acting. In my view, the essential question is whether his claims raise allegations of tortious fault that are distinct and separate from allegations that were more properly addressed on an application for judicial review.

[64] It is worth noting that in two of the companion cases to *TeleZone*, the jurisdictional question was not in issue. Each of the plaintiffs in these cases had not sought judicial review of the statutory decision for which they sought compensation, and in each case the action was allowed to proceed with a claim for damages arising from alleged unlawful government action. The defence of statutory authority could be raised as a defence to the claim: see *Nu-Pharm Inc. v. Canada (Attorney General)*, 2010 SCC 65, and *Parrish & Heimbecker Ltd. v. Canada (Agriculture and Agri-Food)*, 2010 SCC 64.

- [65] The chambers judge and the Crown respondents rely primarily on this Court's judgment in *Cimaco*. The Crown respondents also cite *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, and *Boucher* in support of their argument that the doctrine of collateral attack applies to the appellant's claims.
- [66] These cases affirm the doctrine of collateral attack and the principle that where a claim is essentially a challenge to a government decision, the proper proceeding is by judicial review. As the Crown respondents argue, *TeleZone* did not change those principles. In my opinion, however, it made it clear that not every claim that includes as an element a challenge to a government decision is an impermissible collateral attack and an abuse of process.
- [67] This Court addressed the application of *TeleZone* to claims for damages resulting from the exercise of statutory authority in *Leroux v. Canada (Revenue Agency)*, 2012 BCCA 63. In that case, Mr. Leroux brought an action against the Canada Revenue Agency for damages for misfeasance in public office and negligence founded on the conduct of CRA employees to which he attributed the loss of his business. Among other allegations were complaints that during the course of audits, assessments, and collection procedures, a CRA auditor attempted to extort \$25,000 in cash "to resolve Mr. Leroux's 'tax problem'" (at para. 34). The plaintiff's tax liabilities were ultimately settled, and in the action he did not challenge the validity and enforceability of the tax assessments. CRA applied to have the claims struck on the ground that they amounted to a collateral attack on the validity of the tax assessments, which could only be appealed to the Tax Court of Canada or judicially reviewed by the Federal Court. The Supreme Court judge allowed the claims to proceed on the basis that they raised issues distinct from those that would have been addressed in the statutory review process.
- [68] On CRA's appeal, it argued that Mr. Leroux's claims were a collateral attack on the tax assessments because although he did not seek to set aside the tax assessments, to succeed in any of the alleged causes of action, he had to prove facts contrary to those underlying the consensual resolution of the assessments (at para. 14).
- [69] In her reasons for the Court, Madam Justice Huddart assessed the reach of the doctrine of collateral attack in light of *TeleZone*. She pointed out (at para. 17) that in *TeleZone* (at para. 65), Binnie J. noted that Arbour J. had declined to apply the collateral attack doctrine in *Toronto (City)*, "reasoning (at para. 34) that the Union's argument was an 'implicit attack on the correctness of the factual basis of the decision, not a contest about whether that decision has legal force, as it clearly does'". She noted further that in *TeleZone*, Binnie J. held that in a claim for damages, the court may adjudicate the validity of an order where that is essential to a cause of action and a necessary step in disposing of a claim. Thus, the question before her was whether Mr. Leroux's claims were in effect an appeal from the tax assessments, or raised distinct and separate justiciable issues (at paras. 19, 22). Madam Justice Huddart held that the quantum of Mr. Leroux's tax liability was "nothing more than a fact in a private cause of action, on which both parties can rely" (at para. 24), and upheld the chambers

judge's determination that the causes of action in tort claimed by Mr. Leroux raised issues distinct from those that would have been addressed in the statutory review or appeal process which concerned itself with the validity of the assessments (at para. 23).

- [70] CRA also challenged Mr. Leroux's pleadings as disclosing no reasonable cause of action. Madam Justice Huddart agreed with the chambers judge that Mr. Leroux's pleadings contained the elements of the torts of misfeasance in public office and negligence, but held that further particulars were required to link the attempted extortion with the loss claimed, and to clarify the claim that CRA was liable in negligence.
- [71] In this case, the appellant says that he does not challenge the validity of the Superintendent's decision, but seeks damages for the loss suffered as the result of the Superintendent's conduct in reaching the decision. On its face, this is similar to Mr. Leroux's claim that he did not seek to invalidate the tax assessments, but to be compensated for losses he alleged were suffered as a result of the conduct of CRA employees in the tax assessment process.
- [72] The difference is that unlike Mr. Leroux, who alleged attempted extortion by a CRA employee, the appellant has not pleaded any particulars of any unlawful act engaged in by the Superintendent. As pointed out by Huddart J.A. in *Leroux* (at para. 33), to establish the intentional tort of misfeasance in public office, the statement of claim must disclose material facts supporting each of the constituent elements of the tort, the first of which is deliberate unlawful conduct in the exercise of public functions.
- [73] In this case, the appellant has not pleaded any material facts that support his allegations of misfeasance in public office. In his factum, he acknowledges he has to prove the Superintendent engaged in deliberate and unlawful conduct in administering the Plan, and that he knew both that his conduct was unlawful and it was likely to harm the Retired Members. In the notice of civil claim, he alleges only these elements of the tort – that the Superintendent knew he acted without jurisdiction or lawful authority and contrary to the PBSA and that his acts would cause damage to the Retired Members. He also claims the Superintendent acted in breach of the PBSA or its Regulation.
- [74] In his factum, the appellant says that judicial review was never an appropriate remedy because the Retired Members did not receive direct notice of the Superintendent's decision and therefore it was not clear when the decision that should have been the subject of judicial review was actually made; that the Superintendent could have gone to court to force Pope & Talbot Ltd. to amend the Plan if it did not comply with the PBSA and Regulation, which would have subjected the Superintendent's decision to judicial oversight; and that the information received from the Superintendent was incomplete and inconsistent concerning the issues surrounding registration of the Plan and indicated that Pope & Talbot Ltd. had not fulfilled its responsibilities with respect to approval of the Priority Termination Provisions.

- [75] It is not clear to me how these allegations (which are not set out in the notice of civil claim) support the claim that the Superintendent acted unlawfully or without jurisdiction in administering the Plan as he did. They are more in the nature of allegations of unfairness and lack of process, which are fundamental questions for judicial review.
- [76] The appellant's claims of negligence similarly raise issues that are fundamentally questions for judicial review. The appellant claims the Superintendent acted without jurisdiction or statutory authorization; failed to give consideration to the limits of his jurisdiction or statutory authority; failed to reasonably supervise his staff; failed to investigate the registration of the Plan; and failed to consider the limits of his jurisdiction in approving Morneau's report on the wind-up of the Plan.
- [77] My analysis of the appellant's claims, applying the doctrine of collateral attack as articulated in *TeleZone* and discussed in *Leroux*, leads me to conclude that they do not raise any distinct or separate justiciable issues from those that would be addressed on judicial review. Though he claims a remedy, damages, that would be unavailable if he were successful on judicial review, the essential nature of his claims is an attack on the lawfulness of the Superintendent's decision, raising issues of jurisdiction, limits of statutory authority, process, and fairness. These elements of the Superintendent's decision-making process and exercise of his authority are not simply essential underlying facts on which all the parties to the action may rely.
- [78] By contrast, in *TeleZone*, the action claimed compensation for expenses *TeleZone* incurred in applying for a telecommunications licence, alleging the Minister breached contractual and equitable duties or a duty of care in the licensing process. In *Leroux*, the plaintiff claimed damages for the loss of his business, alleging attempted extortion by a CRA employee in the course of the assessment process. The allegations were in respect of matters separate from the ultimate decision.
- [79] In this case, the appellant claims compensation for allegedly unlawful conduct of the Superintendent in determining jurisdiction and process. As I have previously stated, these are matters central to the Superintendent's lawful exercise of his powers and to the Court's supervisory jurisdiction by judicial review. In the language of *TeleZone* (at para. 78), this is "a claim for judicial review with only a thin pretence to a private wrong".
- [80] It follows that I would not accede to this ground of appeal.
- [81] Morneau takes the position that if the claims are characterized as a collateral attack on the Superintendent's decision, it necessarily follows that the appellant's claim against all of the respondents should be struck. I agree. The action is fundamentally an abuse of the court's process, and cannot proceed.

Conclusion

[82] The appellant's claims are a collateral attack on the Superintendent's decision. They raise no issues that are distinct and separate from those that are properly the subject of judicial review. The chambers judge properly dismissed them as an abuse of process.

[83] I would dismiss the appeal.

"The Honourable Madam Justice Levine"

I AGREE:

"The Honourable Madam Justice Kirkpatrick"

I AGREE:

"The Honourable Madam Justice Garson"

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